STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2001-841

October 8, 2002

BANGOR HYDRO-ELECTRIC COMPANY
Request for Approval of Reorganization and of Affiliated Interest Transactions with Emera Energy Services, Inc.

ORDER ON RECONSIDERATION

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

## I. SUMMARY

On April 10, 2002, Bangor Hydro-Electric Company (BHE) filed a Motion for Reconsideration of our March 21, 2002 Order. In that Order, we approved the creation of Emera Energy Services (EES), an electricity marketing affiliate, with several conditions. BHE objects to one condition in our Order. As discussed below, we grant BHE's request to reconsider the order but only for the purpose of clarifying that costs that arise from the creation or operation of EES may be accounted for below the line rather than requiring EES to reimburse BHE. Although we clarify the condition to provide more flexibility to BHE and EES to decide on its accounting methodology, we deny BHE's request to defer consideration of whether ratepayers should be held harmless from BHE expenses that result from (1) the operation of EES or (2) BHE's compliance with the regulatory requirements of Chapter 820 and Chapter 304. Instead, we affirm that ratepayers should be held harmless from such expenses.

## II. BHE'S MOTION

BHE objects to the following condition in the March 21 Order:

> BHE's ratepayers will be held harmless from any and all liabilities or expenses that arise from the creation and operation, and from any failure of, EES. EES is responsible for any and all such expenses and liabilities. If BHE is named in any legal action involving any alleged act or omission of EES, the cost of defending BHE will be paid by EES. Further EES is required to reimburse BHE for all the costs involved in obtaining approval from the Commission and complying with Chapter 304 and section 3205.

March 21 Order at 20-21. BHE asserts that the condition "is beyond what is required to protect BHE ratepayers and represents an undue burden on EES." Motion for Reconsideration at 2. BHE objects to the requirement for EES to compensate BHE for any future expense incurred by BHE arising out of the operation of EES.

BHE argues that its cost of complying with the codes of conduct should be allocated to BHE (and its ratepayers). Further, BHE asserts that EES should only be responsible for litigation costs involving EES if EES is at fault. BHE proposes the following alternative language to address its concerns:

> (1) All expenses incurred by BHE due to the creation of EES, including all expenses of the proceeding which has resulted in this Order, shall be reimbursed by EES.
>
> (2) Under no event will BHE ratepayers see a rate increase or any impact on rates that may result from any financial failure of EES.
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> (3) All BHE expenses or revenues associated with the Professional Support Services Agreement or the Lease of Management Employees Agreement shall be "below the line" for ratemaking purposes.
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> (4) Except as expressly provided herein, a determination of whether any BHE expense incurred as a result of the operation of EES will be "below the line" for ratemaking purposes shall be made by the PUC, in a future proceeding, on a case by case basis.
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> (5) EES will indemnify and hold harmless BHE for any liability or expenses incurred by BHE as a result of any unlawful act of EES, including any violations by EES of any applicable Standard of conduct as set forth in Title 35-A M.R.S.A. § 3205 or Chapter 304 of the PUC's Rules; excepting however, EES will not have any duty to indemnify BHE for any act or omission of BHE.

BHE states that the proposed revised condition protects ratepayers from all "immediate" costs associated with the creation of EES and the operation of the Affiliate Agreements "and recognizes the PUC's right to decide whether future BHE expenses are recoverable in rates." Motion for Reconsideration at 6. BHE further states that the condition grants "an appropriately limited duty for EES to indemnify BHE due to any unlawful act or practice of EES."

### A. The Public Advocate's Opposition

The Public Advocate opposes BHE's requested changes to the condition. In his view, ratepayers should not be "required to pay for any costs that might result from BHE's corporate parent's discretionary decision to create EES, given that none of these costs would be incurred in the absence of EES." Response at 1. The Public Advocate argues that the condition at issue is consistent with the requirement in section 713 of Title 35-A that a "utility may not charge its ratepayers for costs attributable to unregulated business ventures undertaken by the utility or an affiliated interest."

Further, the Public Advocate points out that the two witnesses presented by BHE did not object to the condition that EES indemnify BHE for all

litigation expenses that may occur as the result of the existence of EES. The Public Advocate notes that the Company already agreed to this condition on the record and has stated no good reason why it should now be changed. The Public Advocate states that the issue is not whether EES has control over future events; rather the issue is whether ratepayers should be exposed to litigation expenses that result from BHE being included in a lawsuit against EES. The Public Advocate asserts that ratepayers should not bear such a risk. He further states that "ratepayers should not be forced to pay for alleged acts or omissions of BHE employees in complying (or failing to comply) with the Standards of Conduct implemented and executed in order to allow the marketing affiliate to operate." Response at 3. Finally, the Public Advocate points out that allocating BHE's costs of complying with the standards of conduct to ratepayers is inconsistent with the purpose of Chapter 820 which "is to *protect* ratepayers from the costs of running an affiliate not to charge them for it, and to insure that ratepayers do not become the guarantors of the affiliate." Response at 4 (emphasis in original). Moreover, the codes of conduct "represent a cost of doing business *for the affiliate* and all resulting costs should be covered by the affiliate." *Id.* at 6 (emphasis in original).

## III. DISCUSSION AND DECISION

While we grant BHE's request to reconsider the condition, we do so *only* to clarify that while ratepayers should not bear costs related to the creation or operation of the affiliate, this can be accomplished either by accounting for such costs below the line or by EES reimbursing BHE for any such costs incurred by BHE. We deny BHE's request to defer consideration of whether ratepayers should be held harmless from BHE expenses that result from (1) the operation of EES or (2) BHE's compliance with the regulatory requirements of Chapters 304 and 820. We conclude that BHE's ratepayers should not be at risk of paying any BHE-incurred expenses that BHE would not have incurred but for the existence of EES. As discussed below, our decision is guided by Chapter 820 and sections 707, 708 and 713 of Title 35-A.

### A. Chapter 820 and Section 713

Chapter 820, which governs affiliate relationships including affiliated competitive electricity providers (CEPs) such as EES, addresses the issues raised by BHE and the Public Advocate. Section 6 of Chapter 820 provides that all non-core and de minimis activities are accounted for "below the line." We stated that below-the-line treatment of costs associated with non-core activities is appropriate because it allocates the potential risks and rewards of the non-core activities to shareholders alone and holds ratepayers indifferent to the existence of the non-core activity. *Public Utilities Commission, Requirement for Non-Core Utility Activities and Transactions Between Affiliates,* Docket No. 97-886, Order Provisionally Adopting Rule and Statement of Factual and Policy Basis at 39 (Feb. 18, 1998). In adopting Chapter 820, we thus indicated that ratepayers should be indifferent to the creation and operation of the non-core entity.

BHE's requested revision to the Order conflicts with this policy determination and with the basic framework of the rule. Under BHE's approach, the costs of complying with Chapter 820 and Chapter 304 could be borne by ratepayers. Such costs are directly attributable to the creation and operation of a marketing affiliate. Therefore, ratepayers would not be indifferent to the existence of a non-core activity. Thus, in asking the Commission to leave open the possibility that ratepayers might bear (1) costs associated with EES (such as BHE's litigation costs if it is joined in a law suit against EES) or (2) BHE's costs of complying with the codes of conduct, BHE asks the Commission to depart from a major tenet of Chapter 820—that ratepayers will be indifferent to the existence of the non-core activity. *See also,* 35-A M.R.S.A. § 713 (a utility may not charge its ratepayers for costs attributable to unregulated business ventures).[1] The underlying rationale for this policy is that affiliates such as EES are set up for the benefit of shareholders. Shareholders, not ratepayers, will benefit from any profits earned by EES. Therefore, ratepayers should not have to pay costs stemming from an enterprise from which they do not stand to gain a benefit.[2]

We reject BHE's argument that the Legislature's determination to allow affiliated CEPs should affect ratemaking determinations. Nothing in section 3205 exempts CEPs from the provisions of chapter 820 or sections 707, 708 and 713 of Title 35-A. In addition, Chapter 304 of our rules which establishes standards of conduct for distribution utilities and affiliated competitive providers, requires a distribution utility and its affiliated competitive provider to comply with all the applicable provisions of Chapter 820.[3] *See*, Chapter 304 § 3(R). Because Chapter 820 requires below-the-line treatment of costs associated with non-core ventures,

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[1] In its response to the Public Advocate, BHE argues that the term "attributable" is ambiguous and may mean that an expense is "attributable" only if "it results from some specific act or omission" of the affiliate or alternatively "only if it provides no benefits to the utility." BHE response at 2. As discussed above, we interpret section 713 to mean that ratepayers will be indifferent to the existence of the affiliate. BHE also asserts that the allocation provision in section 713 indicates the Legislature's intent that ratepayers pay some costs related to the affiliate. The allocation provision simply means that the where there are shared facilities and services the costs of those facilities and services are allocated accordingly.

[2] We find BHE's argument that the potential benefit of having another CEP in the market warrants making its ratepayers liable for costs associated with the CEP to be a curious one to raise in this case in light of the condition in our Order that EES may not act as a CEP in BHE's service territory. Even if that should change, however, the argument does not outweigh the clear intent of Chapter 820 to prohibit such a result.

[3] Because Chapter 304 is a major substantive rule, it was approved by the Legislature.

any costs which BHE would not have incurred but for the creation or operation of the affiliate should be accounted for below the line and not borne by ratepayers.

We next address the argument that EES should not have to bear costs arising from mistakes of BHE. In our view, the issue is not which affiliate should pay for certain BHE actions, but rather whether *ratepayers or shareholders* should be liable for costs stemming from BHE's actions carried out in connection with the creation or operation of CES. Consistent with our policy that ratepayers should be indifferent to both the profits from and expenses relating to a utility's affiliated interest, we conclude that shareholders, rather than ratepayers, should be liable for such costs. However, as discussed below, we clarify that BHE may account for such costs below the line, rather than having EES reimburse BHE.

BHE also argues that the condition is too broad and that ratepayers would never have to pay a cost incurred by a utility "due to the mere existence of any affiliate." This concern fails to recognize that the actual language of the condition refers to liabilities or expenses that arise from the creation and operation of the affiliate. If in the future there is an issue of whether a cost arises from the creation or operation of EES, this question will be addressed on the basis of the particular facts and circumstances surrounding the cost at issue.

Finally, in its motion, BHE argues that EES shareholders should not be held liable for actions not within EES's control. We reject this argument. Emera is the parent of both entities and thus has ultimate control over both entities. Thus, Emera's shareholders and not BHE ratepayers should be at risk for BHE decisions relating to the creation or operation of EES.

In a supplemental filing, made after our deliberation on the rehearing request and before the issuance of this Order, BHE asserts that the language of section 3217 of the statute, governing legislative reports, "appears to reflect the Legislature's view that under existing rules, BHE's costs of complying with the Standards of Conduct would be passed through to ratepayers." BHE letter of May 9, 2002. This section states in relevant part:

> In its report the commission shall provide an accounting of the commission's actual and estimated future costs of enforcing and implementing the provisions of this chapter governing the relationship between a transmission and distribution utility and an affiliated competitive electricity provider and the costs incurred by transmission and distribution utilities in complying with these provisions. The commission shall also provide an assessment of the effects of imposing these costs on ratepayers and the potential effects of assessing transmission and distribution utilities for these costs and prohibiting these costs from being passed through to ratepayers.

35-A M.R.S.A. § 3217(1).

BHE's post-deliberative filing does not change our analysis. We disagree with BHE's assertion that the phrase "these costs" in the last sentence of the quoted text refers to the cost of utility compliance with the provisions governing the relationship between a transmission and distribution utility and its affiliated competitive electricity provider. We conclude instead that "these costs" refer to "the commission's actual and estimated future costs of enforcing and implementing the provisions of this chapter . . ." We find that this is the more reasonable interpretation of this ambiguous sentence because it is consistent with the use of the term "assess" elsewhere in Title 35-A and is consistent with other sections in the chapter that provide that ratepayers should not bear costs associated with the creation or operation of an affiliated competitive provider.

The terms "assess" and "assessment" appear in Title 35-A in connection with the funding of the Commission by assessments on utilities (see section 116), and with the funding of the Commission's electric restructuring consumer education program by a special assessment on electric utilities and transmission distribution utilities (see section 3213(2)). By contrast, the term "charged" is used when discussing whether ratepayers or shareholders should bear a cost "attributable to unregulated business ventures undertaken by the utility or an affiliated interest." *See*, 35-A M.R.S.A. § 713; see also 35-A M.R.S.A. § 707(3)(G) ("When its facilities, service or intangibles are used by the affiliated interest, the utility's costs must be charged to and received from the affiliated interest . . .. ").

Further, as discussed above, reading this section, which relates to Commission reports, in the manner suggested by BHE is inconsistent with other provisions in the statute and our rules which provide that ratepayers should neither bear the costs nor reap the profits from affiliated ventures. We decline to adopt an interpretation that is inconsistent with other provisions of the statute.[4] Finally, even if the section were to be read in the manner suggested by BHE, the language does not *compel* any result, in contrast with other statutory provisions that mandate that ratepayers shall be held harmless from costs associated with a utility's creation and/or operation of an affiliated venture.

We do clarify one aspect of our Order. Because Chapter 820 requires that costs be accounted for below the line, we clarify that BHE costs associated with EES may be accounted for "below the line" rather than being charged to EES. In addition, for additional clarity, we have added a phrase that specifies that Chapter 304

[4] We note in this regard that section 708 of Title 35-A requires us, in approving any reorganization, to adopt conditions to ensure that ratepayers are not adversely affected by the reorganization. If we were to read section 3217 to prevent us from adopting a condition that requires that shareholders are responsible for the cost of complying with rules governing affiliated relationships, it is not clear that we could make a finding that ratepayers will not be adversely affected by the reorganization. By contrast, our interpretation allows the reorganization to go forward while protecting ratepayers from having to bear costs associated with the creation or operation of EES.

compliance costs include Chapter 820 compliance costs. While this clarification may not be necessary since Chapter 304 requires compliance with Chapter 820, we add this phrase to make clear, to the extent possible, the application of the ratepayer "hold harmless" language.

Accordingly, we revise the condition at issue as follows.

> BHE's ratepayers will be held harmless from any and all liabilities or expenses that arise from the creation or operation, or from any failure, of EES. All such expenses and liabilities shall be accounted for "below the line." If BHE is named in any legal action involving any alleged act or omission of EES, the cost of defending BHE will be accounted for "below the line." Further, all BHE costs involved in obtaining approval from the Commission and complying with Chapter 304 (including the requirements of Chapter 820) will either be reimbursed by EES or shall be accounted for "below the line."

Dated at Augusta, Maine this 8th day of October, 2002.

BY ORDER OF THE COMMISSION

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Dennis Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.